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No. 03-9168

IN THE

Supreme Court of the United States

REGINALD SHEPARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF

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REPLY BRIEF

I. *SHEPARD IV* IS INCONSISTENT WITH BOTH THE HOLDING AND THE RATIONALE OF *TAYLOR*.

The rule announced in *Taylor v. United States*, 495 U.S. 575 (1990), is clear. Where a defendant has previously been convicted under a non-generic burglary statute, that conviction may only serve as a predicate offense under the Armed Career Criminal Act ("ACCA") if the sentencing court can conclude with certainty that all of the elements of generic burglary had been *adjudicated*. *See id.* at 602. Respondent does not dispute this. *See, e.g.*, Resp. Br. 15. In the case of a jury trial, this Court explained that a sentencing court may reach this conclusion by reviewing only the charging document and the jury instructions to determine if the jury "was actually required to find all the elements of generic burglary." *Taylor*, 495 U.S. at 602. For example, if a State's burglary statute includes entry of a car or a building, a conviction under that statute could be used for enhancement only if it could be shown that the jury "necessarily had to find entry of a building to convict" based on the "indictment or information *and* jury instructions." *Id.* (emphasis added).

Where a conviction has been obtained by a guilty plea, a sentencing court is likewise required to make a determination that each element of generic burglary has been adjudicated in order for that conviction to qualify as a predicate offense. Respondent does not dispute this either. Resp. Br. 17, 23. But Respondent argues that the *Harris* question – whether, at the time of the state court pleas, the defendant and the government both believed that generic burglary was at issue – is equivalent to the *Taylor* inquiry of whether all the elements of generic burglary were necessarily adjudicated. The issues then – and where Respondent and Petitioner part ways – are [1] whether the *Harris* question is the equivalent of the *Taylor*

question, [2] what information a sentencing court may examine to determine whether all the elements of generic burglary were actually adjudicated, and [3] whether the burden of proof on that issue was improperly shifted to the defendant by the First Circuit.

Respondent contends that *Taylor* may be read to require a sentencing court to draw inferences from the "state case file" to conclude that the necessary elements had been adjudicated. Resp. Br. 15; *see also United States v. Shepard*, 348 F.3d 308, 312 (1st Cir. 2003) ("*Shepard IV*"); JA 178-79 (stating that under *Taylor*, a burglary conviction constitutes a crime of violence under the ACCA "even if the indictment were silent as to the venue so long as the case files showed that the plea was to burglary of a house"). Examination of the documents in the state court file (such as police reports and complaint applications) is useful only if the inquiry is shifted from what elements were actually adjudicated by the convicting court to the conduct underlying the conviction. *Taylor* flatly prohibits this inquiry. 495 U.S. at 600-02.

In the guilty plea context, *Taylor* allows sentencing courts to look only to those documents that reveal what elements were necessarily found by the trier of fact or admitted by the defendant.[1] This elements analysis corresponds to the review

[1] Most Courts of Appeals to have considered the application of the *Taylor* exception in the guilty plea context have agreed with Petitioner's analysis. They have held that where a prior conviction is based on a guilty plea under a nongeneric statute, only the charging document and court documents that are the functional equivalent of jury instructions can be consulted to identify the elements necessarily determined in the conviction. *See, e.g., United States v. Payton*, 918 F.2d 54, 55-56 (8th Cir. 1990) (prohibiting the use of police reports in the context of a guilty plea). The documents considered have included: a signed guilty plea and transcript from plea proceedings, *United States v. Bonat*, 106 F.3d 1472, 1476 (9th Cir. 1997); a plea agreement, *United States v. Gallman*, 907 F.2d 639, 645 n.7 (7th Cir. 1990); a plea transcript, *United States v. Maness*, 23 F.3d 1006, 1009-10 (6th Cir. 1994); factual findings of the state court following the plea, *United States v. Rutherford*, 54 F.3d 370, 372 n.4 (7th Cir. 1995); or some combination of these, *United States v. Hill*, 131 F.3d 1056, 1065 (D.C. Cir. 1997).

of charging documents and jury instructions in jury trial convictions. The examination of any other evidence (such as police reports) requires that the sentencing court engage in the very factfinding prohibited by *Taylor*. Contrary to Respondent's argument, Resp. Br. 18, the police incident reports and complaint applications are not "record evidence." The district court found on uncontested evidence that they played no part in the guilt adjudications.[2] *United States v. Shepard*, 181 F. Supp. 2d 14, 23-26 (D. Mass. 2002) ("*Shepard III*"); JA 160-65.

The First Circuit's analysis requires the sentencing court to determine what the conduct underlying the defendant's prior convictions was, and uses that conduct to establish, not whether he was necessarily found guilty of all of the elements of generic burglary, but whether he and the prosecutor probably believed that generic burglary was at issue. This is not a categorical analysis, and *Taylor* explicitly prohibits this inquiry. 495 U.S. at 600-602.

A. The *Shepard* Analysis Requires Fact Finding Contrary to *Taylor*'s Prohibition.

The *Shepard* analysis side-steps *Taylor*'s categorical analysis by requiring the sentencing court to find the facts regarding the conduct underlying the defendant's nongeneric convictions. Respondent argues that this approach is consistent with *Taylor* and the ACCA because [1] in both

[2] The First Circuit conceded that the district court's findings, based on Petitioner's uncontested affidavit, were responsive to the issues identified in its remand order, *United States v. Shepard*, 231 F.3d 56, 68 (1st Cir. 2001) ("*Shepard II*"); J.A. 86, 91; *Shepard IV*, 348 F.3d at 314 n.6; J.A. 183 n.6. But in its evaluation of Petitioner's affidavit, the court did not acknowledge that it had changed the subject from what role the police incident reports played in the plea proceeding, to whether Petitioner had rebutted the "natural inference" that "the pleas were to *the crimes described in the case files*." *Id.* at 314; J.A. 182 (emphasis added).

analyses, the sentencing court "examines documents in the case file"; [2] the inquiries are "logically parallel"; and [3] both analyses emphasize "the fact of conviction" and "the elements of the statute of conviction." Resp. Br. 23. None of these claims withstands critical analysis.

Taylor's categorical analysis requires identifying the elements of the crime of conviction and comparing them to the elements of generic burglary. 495 U.S. at 602. Nothing in *Taylor* supports the argument that whatever "documents in the case file" happen to be available can be consulted for this purpose. *Taylor*'s preferred source is the statute of conviction; when the statute is nongeneric, the charging document and jury instructions can be examined only to identify the elements of the conviction. *Id.* Petitioner contends that the Court's specification of the charging document and jury instructions was meaningful and deliberately narrow. The jury instructions readily lend themselves to categorical analysis and can be expected to provide undisputed information: they either require the jury to find all of the elements of generic burglary or they do not. The jury instructions are prepared by the judge and are presumed to have guided the jury's decision-making. Thus, they are the product of the adversary process, which has a tendency to narrow the focus of the charging documents. They are contemporaneous to the adjudication and so are likely to reflect accurately the elements of conviction and to be authentic.

The police incident reports share none of these qualities. They were found to have been unrelated to the adjudications in Petitioner's cases. Nothing in them states the elements of conviction. In Massachusetts state district court practice, they do nothing more than provide the clerk with information from which to prepare the complaint. The complaint is the document used in the courtroom. *Commonwealth v. Arias*, 778 N.E.2d 523, 527-28 (Mass. App. Ct. 2002). Most of the facts stated in them do not find their way into the charge

stated in the complaints. The complaints do not frame the elemental terms of the litigation, much less specify what elements the defendant necessarily admitted or the judge necessarily found in the guilty plea. The police incident reports are useless for categorical analysis because they do not conclusively establish what the elements of conviction were. They are useful only for factual analysis, which Taylor prohibits.[3] *United States v. Payton*, 918 F.2d 54, 55-56 (8th Cir. 1990) (on remand after reversal in light of *Taylor*, disallowing the use of a police report to establish guilty plea as generic burglary conviction); *United States v. Allen*, 282 F.3d 339, 343 (5th Cir. 2002); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1212-13 (9th Cir. 2002) (en banc).

The *Taylor* and *Shepard* inquiries are not equivalents. *Taylor* prescribes a simple method of identification of the elements of conviction from either the statute of conviction or the adjudicated elements of conviction as set out in the charging document and jury instructions, or other contemporaneous court records of the conviction. It is fair, uniform and readily produces unequivocal results. It avoids all inquiry into the defendant's underlying conduct. *See United States v. Shepard*, 125 F. Supp. 2d 562, 570 & n.14 (D. Mass. 2000); J.A. 60 & n.14. The litigation in this case vividly demonstrates that the *Shepard* analysis is neither categorical, nor simple, and it invites speculative judgments, which can reflect the district or appellate court's policy preferences. *Shepard IV*, 348 F.3d at 311, 314-15; J.A. 176-77, 183. It is founded on a post-hoc determination of the

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[3] The First Circuit's holding is not merely that the police reports must be considered, but that, absent extraordinary circumstances established by the defendant, they are conclusive. *Shepard IV*, 348 F.3d at 314; J.A. 182. As a practical matter, this means that the sentencing court is powerless to require plea colloquies or other more authoritative and contemporaneous court documents unless the defendant effectively challenges the facts in the police reports. *Shepard II*, 231 F.3d at 69; J.A. 88-89.

defendant's underlying conduct and not the adjudicated elements of conviction.

Because the First Circuit treats the nongeneric guilty plea inquiry as just another sentencing matter, the "necessarily found" standard of *Taylor* does not apply to it:

> The concept of a necessary finding does not apply to disputes about the meaning of a defendant's guilty plea, and whether that plea constitutes an admission to a violent felony or a crime of violence. As we have indicated, those disputes must be resolved by a finding of fact pursuant to the preponderance of the evidence standard. Such a finding is not a necessity. It is based on a judgment about the weight of the evidence.

Shepard II, 231 F.3d at 68-69; J.A. 89. Moreover, the sentencing judge's determination that the defendant and the government both believed that generic burglary was at issue in the state court guilty plea need not "be based on adjudicated or specifically admitted facts." *Compare id.* at 70; J.A. 91, *with United States v. Franklin*, 235 F.3d 1165, 1173 (9th Cir. 2000) ("[T]he government must prove that the defendant by plea admitted to all of the elements of generic burglary."), *and United States v. Dueno*, 171 F.3d 3, 7 (1st Cir. 1999) (enhancement permitted only for "prior crimes of which he has been convicted – either by a trier of fact or by his own admission"). Thus, the First Circuit's analysis does not require a determination that all of the elements of generic burglary have necessarily been admitted or adjudicated, which is the fundamental objective of *Taylor*'s categorical analysis.

The proposition that the "building" element of generic burglary was necessarily adjudicated in Petitioner's guilty pleas is presumed in the *Shepard* analysis. The district court found that this issue was not addressed in the state court

proceedings.[4] *Shepard III*, 181 F. Supp. 2d at 23-26; J.A. 161-62, 165. The district court record established only that Petitioner was charged with nongeneric crimes and pleaded guilty. The presumption of regularity does not advance Respondent's argument. It is a burden-shifting procedural rule, which comes into play only when a defendant collaterally attacks the validity of a conviction that has become final. *Parke v. Raley*, 506 U.S. 20, 24 (1992). Even employed as Respondent advocates, it does not establish that any particular factual basis was recorded in Petitioner's pleas. Nothing in the record supports the assumption that the state court was required to, or did require an admission to, or make a finding of entry of a building. The only thing Judge Gertner could be certain of was that Petitioner pleaded guilty to breaking and entering some property. The First Circuit found that it was unnecessary to determine whether the "building" element was necessarily adjudicated because it was established by that court's finding that Petitioner actually committed generic burglary. *Shepard IV*, 348 F.3d at 314; J.A. 182. This method of applying the ACCA is prohibited outright by *Taylor* and this Court should not countenance it.

B. The *Shepard* Analysis Improperly Required The Petitioner To Rebut A "Compelling Inference" That He Pleaded Guilty To The Conduct Described In The Police Incident Reports.

Respondent does not contend that the judgments of conviction, standing alone, meet its burden of proving that Shepard had been convicted of three or more "violent felonies" for purposes of the ACCA enhancement. In fact, Respondent made plain that it could not satisfy its burden unless the factual allegations in the police reports and complaint applications were taken into account by the district judge. Resp. Br. 24. *Shepard II* required the sentencing court

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[4] The soundness of this proposition was discussed at length in the district court. J.A. 116-19, 128.

to consider the police reports in making the enhancement determination; no other kind of documentary evidence was ever offered by Respondent in support of its enhancement argument. However, the question to be answered by reference to Respondent's documents was not the *Taylor* question – whether Shepard's prior convictions "necessarily" implied that he had been found guilty of all the elements of generic burglary – but the *Harris* question: "did the defendant and the government both believe at the time Shepard entered his pleas 'that the generically violent crime . . . rather than the generally non-violent crime . . . was at issue.'" *Shepard II*, 231 F.3d at 68-69; J.A. 88.

To answer the *Harris* question, the First Circuit created an inference from the hearsay statements in the police incident reports that the conduct described therein was in the defendant's consciousness at the time he entered his plea.[5] The plea was then interpreted as a guilty plea to generic burglary, even though neither the police reports nor buildings were mentioned during the actual plea proceeding. To avoid this inference and the enhancement based on it, Shepard was required to mount a "challenge to the accuracy of the statements in those documents describing entries in buildings." *Id.* at 68; J.A. 87. Absent such a rebuttal, Shepard would be deemed to have admitted the truth of the allegations contained in the police reports and complaint applications. This "admission" then provided the factual basis on which the court must conclude that the defendant believed that he was pleading guilty to generic burglary, despite the nongeneric complaint and statute. Shepard's belief, thus established, was substituted for the *Taylor* requirement that all of the elements of generic burglary had been admitted or otherwise established during the plea proceeding. By changing the question, the burden was

[5] The constitutional requirement is that these thoughts be verbalized and recorded so that speculation about them is unnecessary. *Henderson v. Morgan*, 426 U.S. 637, 647 (1976).

effectively shifted to Shepard to prove that he did not have three or more generic burglary convictions.

Respondent defends first by asserting that the court of appeals did not shift the burden to the defendant "to show that the [ACCA] enhancement does not apply." Resp. Br. 33. In the next breath, however, Respondent admits that the court did place "demands" on Petitioner to rebut the police reports and complaint applications or suffer the enhancement. *Id.* at 34. In fact, during argument before Judge Gertner, Respondent explicitly took the position that, with the production of the police reports "we have met our initial burden of proof; and, at that point, *the burden does shift . . . to the defendant.*" J.A. 114 (emphasis added). For this proposition, Respondent relied on *Shepard II*: "But I think Judge Lipez could not be clearer when he says that, more specifically, after discussing Harris, did the defendant provide anything at his plea hearings . . . to contest those facts set forth. And we have nothing."[6] J.A. 115.

Hedging its argument that the burden was not shifted, Respondent suggests that the demands of the burden shifting were not "exorbitant":

> For example, petitioner could have filed an affidavit in which he swore that on the occasions in question, he had pleaded guilty to the burglary of a ship or vehicle nowhere mentioned in the complaint application or police report. *See*, J.A. 117 (prosecutor states that it would have been sufficient for petitioner to state that "[a]t the time of my plea I told them it was not a building, it was a car," or even "I contested it in some way").

[6] This burden shifting argument was rejected by the district court. Addressing it, Judge Gertner said to the government: "But the question is whose burden is that? If it is your burden, the 'nothing' means that there is no enhancement." J.A. 115.

Resp. Br. 34-35. Shepard did file an affidavit swearing that Respondent's documents were not involved in any of his guilty plea proceedings, J.A. 100, but Respondent and the First Circuit regard that fact as irrelevant. The same is true for Judge Gertner's finding (based on everything she had before her, including Respondent's documents) that the facts contained in the police reports "never came up" at the plea proceedings and that there was "no indication that they were ever made part of the record of the plea colloquy." J.A. 161-62, 165. The district court observed that "[a] review of the plea colloquy would obviously enable me to reconstruct the plea and answer the relevant questions." J.A. 160. In view of all the evidence, the sentencing court concluded that Respondent had failed to meet its burden of proof with the police reports. J.A. 161-62, 165.

Respondent defends *Shepard IV*'s rejection of the district court's findings and conclusions by claiming that it had produced "overwhelming" evidence "that petitioner had pleaded guilty in five cases in which the complaint application and incorporated police report clearly *indicated* that the offense involved burglary of a building." Resp. Br. 34 (emphasis added). This is a perfect example of determining the nature of the conviction from the alleged underlying conduct rather than from the elements of the offense. This is precisely forbidden by the *Taylor* categorical approach, which provided a negative response to the question "whether, in the case of a defendant who has been *convicted* under a nongeneric-burglary statute, the Government may seek enhancement on the ground that he *actually committed* generic burglary." *Taylor*, 495 U.S. at 599-600 (emphases added).

There is nothing in *Taylor* to suggest that a sentencing court is free to shift the burden of persuasion to the defendant once the government has raised an inference that he pleaded guilty to generic burglary, yet this is the position espoused by Respondent. Resp. Br. 34. The First Circuit created this

burden-shifting construct specifically for the purpose of making inherently ambiguous guilty plea convictions available as sentence enhancers under the ACCA. It rejected the *Taylor* requirement that the conviction (as opposed to the underlying conduct) "necessarily implies that the defendant has been found guilty of all the elements of generic burglary" (*Taylor*, 495 U.S. at 599) in the guilty plea context. *Shepard II*, 231 F.3d at 68-69; J.A. 89. This approach allowed the court to place a burden on the defendant, which required him to present "'countervailing evidence to defeat the inference' that he had pleaded guilty to generic burglary." Resp. Br. 34. Shifting the burden to the defendant to disprove applicability of the ACCA is incompatible with *Taylor*. It requires reversal of *Shepard IV* and reinstatement of the judgment of the district court.

C. The *Shepard* Account Of The Relationship Of The Police Reports And Complaint Applications To The Guilty Pleas Is Inaccurate.

In support of the "compelling inference" that the complaints embodied the facts alleged in the police incident reports and that Petitioner's guilty pleas were to the complaints, Respondent and the First Circuit present a thumbnail sketch of the law, practice and procedure followed in Massachusetts district courts regarding the criminal complaint application process and its relationship to criminal litigation in those courts. *Shepard IV*, 348 F.3d at 309-10, 314; J.A. 174, 182; Resp. Br. 25-28. These descriptions of Massachusetts law and procedure are simply wrong.

Moreover, even if all of Respondent's arguments about Massachusetts district court procedure and practice are accepted, *arguendo*, they fail to establish that the federally relevant element – entry of a building – was necessarily adjudicated in the state court guilty plea proceedings. The district court explicitly found that this issue was not addressed there. *Shepard III*, 181 F. Supp. 2d at 23-26; J.A. 161-62, 165.

Respondent's assertion that the underlying conduct alleged in the complaint applications and police incident reports was "embodied" in the complaints is a metaphysical construct. The "building" allegations did not make it into the complaints. No Massachusetts law or practice supports the court's statement that they are nevertheless "embodied" in the complaint. The complaint application "is merely an aid to the court in facilitating the preparation of the Complaint." The complaint is the document used in the courtroom. *Arias*, 778 N.E.2d at 527-28. Massachusetts complaints are not at all like federal informations, *Commonwealth v. Baldassini*, 260 N.E.2d 150, 154-55 (Mass. 1970), nor like the complaints issued in Maryland, where the affidavits of the complaining witnesses are attached to, and made part of the complaint as a matter of state law. *Compare United States v. Coleman*, 158 F.3d 199, 202-03 (4th Cir. 1998), *with Shepard IV*, 348 F.3d at 314; J.A. 183 (citing *Coleman*); *contrast Franklin*, 235 F.3d at 1171-72 (factual allegations in charging papers are inadequate to establish elements of conviction).

Respondent argues that discovery rules in the Massachusetts district court support a finding that the police incident reports and complaint applications were furnished to Petitioner, and that Massachusetts law presumes that individual defendants have personal knowledge of the contents of police reports furnished in discovery. Resp. Br. 26-27. Neither of the discovery rules cited by Respondent applies to any of Petitioner's convictions. Superior Court Standing Order 2-86 applies only in Superior Court.[7] The version of District Court Rule 3 cited by Respondent was promulgated in 1994 and went into effect in 1996 (*id.* at 27), after the last of Petitioner's guilty plea convictions. Accordingly, nothing presented by Respondent supports an

[7] The Massachusetts Trial Court is composed of seven administrative departments, including the Superior Court Department and the District Court Department, each promulgates its own rules. Mass. Gen. Laws ch. 211B; *id.* ch. 213 § 3.; *id.* ch. 218 § 43.

inference that the police incident reports or complaint applications were given to the defendant in any of Petitioner's cases.

Massachusetts law does not presume that a criminal defendant has personal knowledge of the contents of police incident reports, which accompanied the complaint applications in his case. Both the First Circuit and Respondent cite *Commonwealth v. Brown*, 748 N.E.2d 972, 981 (Mass. App. Ct. 2001) for the proposition that it does. Resp. Br. 25 & 26 n.4; *Shepard IV*, 348 F.3d at 310; JA 174. The word "presumption" does not appear in that opinion, in which the court held that, on the facts of that case as disclosed in the trial transcript, the defense (not the defendant individually) was actually aware of facts stated, *inter alia*, in a police report which had been provided in discovery.[8] *Brown*, 748 N.E.2d at 981-82. Respondent's argument that the conduct attributed to Petitioner in the police incident reports is "embodied" in the complaint and that Petitioner pleaded guilty to that conduct is thus unfounded.

Respondent cites "[s]everal factors [which] give rise to the strong inference that, absent evidence to the contrary, petitioner's guilty pleas constituted admissions to breaking and entering a building." Resp. Br. 26. The first is the statement in a practice book that in Massachusetts courts the factual basis for a guilty plea is usually established by, *inter alia*, a reading of the police reports. *Id.* (citing 2 Blumenson et al., *Massachusetts Criminal Practice* § 37.7B at 288 (1998)). But Judge Gertner's findings constitute "evidence to the contrary," which precludes Respondent's inference.

This discussion places the First Circuit's "compelling inference" on its real footing. It rests solely on the First

[8] Respondent misreads *Commonwealth v. Durling*, 551 N.E.2d 1193, 1200-01 (Mass. 1990) (Resp. Br. 32), to say that police reports are "inherent[ly] reliabl[e]." *Durling* addresses two specific police reports and not police reports in general. 551 N.E.2d at 1200.

Circuit's conclusion that Petitioner actually committed generic burglaries, was constructively charged with generic burglary in the nongeneric complaints, and constructively pleaded guilty to generic burglary despite Respondent's failure to present any evidence of what really occurred in any one of the guilty pleas. *Shepard IV*, 348 F.3d at 311-12, 314; J.A. 176-78, 181-83.

D. The "Happenstance" Of State Court Record Keeping Does Not Warrant Respondent's Proposed Expansion Of *Taylor*.

At bottom, the argument that resort to the defendant's underlying conduct is necessary appears to be prompted primarily by the fact that *Taylor*'s categorical method "would frequently make it impossible for the government to pursue enhancements against even the worst offenders, as this case demonstrates. . . . Such a rule would have a particularly grave effect in Massachusetts, where recordings of plea colloquies are routinely destroyed after only a brief retention period." Resp. Br. 29. Several responses to this argument are warranted.

First, the *Taylor* Court cited "the happenstance of state court record-keeping practices" (Resp. Br. 29) as a strong reason for concluding that Congress intended that a categorical analysis rather than a factual analysis of the defendant's underlying conduct be employed in administering the ACCA's sentence enhancement. With respect to guilty pleas *Taylor* noted: "Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts." 495 U.S. at 601. Strict adherence to the categorical method reduces the impact of the vagaries of state court record-keeping practices.[9] Second, the *Taylor* Court

[9] In *United States v. Parker*, 5 F.3d 1322, 1328 (9th Cir. 1993) the court noted that the vagaries of state court record keeping practices will have a negative impact on either the defendant or the government. Assuming that this problem will affect primarily older convictions, the

recognized that, under its categorical analysis, not all defendants with an extensive criminal record would necessarily qualify for ACCA enhancement and pointed out that conduct-based alternatives are available: "Even if an enhancement is not available under § 924(e), the Government may still present evidence of the defendant's actual prior criminal conduct, to increase his sentence for the § 922(g)(1) violation under the Federal Sentencing Guidelines." *Id.* at 602 n.10. Judge Gertner invited and then granted Respondent's request for an upward departure because Petitioner's criminal history score underrepresented the seriousness of his record. J.A. 30, 33, 47-48. In doing this, she distinguished between "the formality required for the ACCA and the formality required in evaluating an ordinary record." J.A. 120. Petitioner's criminal record was properly accounted for.

II. THE RULE OF LENITY PRECLUDES ACCEPTANCE OF THE BROADER APPLICATION METHOD ADOPTED BY THE FIRST CIRCUIT AND ADVOCATED BY RESPONDENT.

Respondent contends that Petitioner's rule of lenity argument is unclear. Resp. Br. 42. Justice Scalia, in his *Taylor* concurrence, suggested that if the Court thought the ACCA was ambiguous, the rule of lenity would apply to help resolve that ambiguity. *See Taylor*, 495 U.S. at 603 (Scalia, J., concurring). This is precisely Petitioner's point.

The First Circuit's interpretation of that categorical analysis in the *Harris* line of cases (defended by Respondent, Resp. Br. 42) assumes there exists an ambiguity to be resolved (the "nature" of the prior plea), that by extension lies in the statute

court followed "the general sentencing principle that the passage of time should dilute – and not magnify – the effect of past conduct on punishment for present acts," (citing U.S.S.G. § 4B1.2(e)'s time limitations in calculating criminal history). This issue was presented to the district court. J.A. 126-28.

itself ("violent felony"). *Shepard IV*, 348 F.3d at 311-12; J.A. 177-78. Petitioner does not concede that the ambiguity exists. Petitioner's prior pleas were to "nongeneric" burglary charges, and the sentencing court was not required to determine anything further. If, as Respondent contends, some ambiguity necessarily remains (Resp. Br. 42) then regardless of its source, that ambiguity must be resolved in light of the rule of lenity. This is because the First Circuit's interpretations, supplanting *Taylor*'s question of law with *Harris*'s fact investigation to apply the ACCA enhancement to convictions of crimes which do not formally constitute generic burglary, present "a more extensive" punitive intent[10] than the plain meaning of the statute expounded in *Taylor*. *See Shepard IV*, 348 F.3d at 309-10, 314; J.A. 172-75, 183.

The *Taylor* Court cites with approval an appellate court decision that applies the rule of lenity to these same issues. In *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988), the Ninth Circuit held that a categorical construction of the "'otherwise'" clause of § 924(e)(2)(B)(ii) "is the approach most consistent with the principle of lenity." *Id.* at 1009. In evaluating both a fact finding method and a categorical method of applying the ACCA enhancement and concluding that Congress intended exclusive use of the categorical, the *Taylor* Court avoided the lenity questions altogether.

Respondent's argument here assumes that the following passage from *Taylor* need not necessarily be read in the conjunctive:

> For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information *and* jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government

[10] *Taylor*, 495 U.S. at 603 (Scalia, J., concurring).

> should be allowed to use the conviction for enhancement.

495 U.S. at 602 (emphasis added). In *United States v. Harris*, the First Circuit rejected a literal reading of this passage, preferring to view it as an example rather than as a prescription. 964 F.2d 1234, 1236 (1st Cir. 1992); Resp. Br. 21-22. The First Circuit construed it to permit the lower courts, in cases involving guilty plea convictions under "a single statute that covers more than one crime" to explore "other ways" to determine "which of those crimes the prior conviction involved." *Harris*, 964 F.2d at 1236. The court hypothesized that, where the indictment "simply charged a violation of the statute":

> In such a case, we believe it would be appropriate for the sentencing court to look to the conduct in respect to which the defendant was charged and pled guilty . . . because that conduct may indicate that the defendant and the government both believed that the generically violent crime ("building"), rather than the generically non-violent crime ("vehicle") was at issue.

Id. This is obviously a penalty-expansive interpretation of the statute.

In short, the *Harris* method rests on the premise that *Taylor*'s "example" of how the categorical method applies to guilty plea convictions under a nongeneric statute is ambiguous, at least in cases in which the charging document is cast in nongeneric statutory terms. The narrower interpretation is that, where only a nongeneric charging document and a general finding of guilty are available, the categorical method precludes use of the conviction for enhancement. *Taylor*, 495 U.S. at 599, 602 (sources consulted must establish that all of the elements of generic burglary were "necessarily" adjudicated). The *Harris* method is based on the broader interpretation – rejecting *Taylor*'s "necessarily" requirement – which the First Circuit prefers

because, as that court indicated in *Shepard IV*, it applies the ACCA enhancement to a broader class of cases. 348 F.3d at 311-12, J.A. 177-79. If both interpretations of *Taylor*'s construction of the ACCA are possible, the rule of lenity requires the Court to follow the narrower construction, "the one least likely to impose penalties Congress did not intend." *Sherbondy*, 865 F.2d at 1009; *see United States v. Bass*, 404 U.S. 336, 347 (1971) (plurality opinion).

III. CONSTITUTIONAL AVOIDANCE COUNSELS A NARROW READING OF *TAYLOR* AND REVERSAL OF THE FIRST CIRCUIT.

Respondent argues that Petitioner espouses a narrow reading of *Taylor* to allow this Court "to avoid addressing the question whether Congress may constitutionally draft a criminal statute that predicates an enhanced penalty on a judicial determination of the nature of a defendant's prior convictions." Resp. Br. 36. The statute to which Respondent refers is of course the Armed Career Criminal Act (18 U.S.C. § 924(e)). Petitioner's short response is that *Taylor*'s formal categorical approach provides the answer to that question.

Relying on *Almendarez-Torres*, Respondent asserts that there is "no grave doubt under current law . . . about the constitutionality of having a judge determine the *nature* of a prior conviction." Resp. Br. 36 (emphasis added). A narrow application of the *Taylor* categorical analysis would certainly support that assertion. *Almendarez-Torres* does not address the method to be employed in determining the "nature" of a prior conviction because that question had already been settled in *Taylor*. The nature of the convictions underlying the sentence enhancement in *Almendarez-Torres* – aggravated felonies – was admitted and was not involved in the resolution of the constitutional issue of whether 8 U.S.C. § 1326(b)(2) defined a separate aggravated re-entry offense or "simply authorize[d] an enhanced sentence when an offender also has an earlier conviction." *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998). Had the "aggravated

felony" issue been litigated, it would have been resolved using *Taylor*'s categorical method. *United States v. Rivera-Sanchez*, 247 F.3d 905, 907-08 (9th Cir. 2001) (en banc). *Almendarez-Torres* simply held that the Constitution did not require the fact of a prior conviction to be pleaded in an indictment. 523 U.S. at 226-27. This holding has been explained as "a narrow exception to the general rule" that "'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (alteration omitted).

Respondent's proposed expansion of the *Taylor* analysis to include factual inquiry into the conduct underlying a prior conviction, as a method of determining the "nature" of that conviction for purposes of imposing a sentence beyond the applicable statutory maximum, does raise questions implicating the defendant's Sixth Amendment right to trial by jury and Fifth Amendment right to proof beyond a reasonable doubt. *Blakely v. Washington*, 124 S. Ct. 2531, 2537-38 (2004); *Ring v. Arizona*, 536 U.S. 584, 602 (2002)

Taylor avoided this question by mandating a categorical method of analysis – posing a question of law – to be answered without regard or reference to the particular facts underlying a prior conviction whose "nature" as a "violent felony" had to be necessarily established before a sentence could be enhanced under the ACCA. 495 U.S. at 602. Respondent presses, however, for a reinterpretation of the ACCA, one that would require a sentencing court to conduct a factual inquiry into the "nature" of a prior conviction where application of the categorical method does not result in a determination that a prior conviction is a "violent felony." Resp. Br. 38-39. The "violent felony" determination is a prerequisite to imposition of the ACCA enhanced 15 year mandatory minimum sentence.

It is Respondent's suggestion that the ACCA is "genuinely susceptible" of such an interpretation that creates the need for this Court to employ the canon of constitutional avoidance in deciding the scope and flexibility of the *Taylor* categorical method of determining whether a prior conviction is a "violent felony." *Jones v. United States*, 526 U.S. 227, 239 (1999) (constitutional doubts prompted by one proposed reading of a statute should be resolved against that reading); *see also Dretke v. Haley*, 124 S. Ct. 1847, 1853-54 (2004) (electing to remand for consideration of Petitioner's ineffective assistance of counsel claim as a method of avoiding difficult constitutional questions raised by his "actual innocence" claim). Petitioner's interpretation of *Taylor* avoids that problem. *See Jones*, 526 U.S. at 239.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court Of Appeals For The First Circuit and hold that *Taylor*'s categorical analysis precludes fact finding regarding the defendant's conduct underlying his conviction in determining whether that conviction qualifies as an ACCA predicate.

Respectfully submitted,

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